FILE COPY

Office - Supreme Court
FILED
MAY 7 19
CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 738.

ARKANSAS OAK FLOORING COMPANY, ET AL., *Petitioner,*

v.

LOUISIANA & ARKANSAS RAILWAY COMPANY, *Respondent.*

RESPONDENT'S BRIEF OPPOSING THE GRANTING OF A WRIT OF CERTIORARI.

T. W. HOLLOMAN,
WHITE, HOLLOMAN & WHITE,
Alexandria, Louisiana.

A. L. BURFORD,
Texarkana, Ark.-Tex.
Attorneys for Respondent.

JOSEPH R. BROWN,
WILLIAM E. DAVIS,
Kansas City, Missouri,
Of Counsel.

May 7, 1948.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
I. The Opinions of the Courts Below	1
II. Statement of the Case	1
III. Argument	3

LIST OF AUTHORITIES.

Cases.

Arkansas Oak Flooring Co., et al., vs. La. & Ark. Ry. Co., 166 Fed. (2d) 98	1
Central Railroad Co. of New Jersey vs. United States, 257 U. S., 247, 254-255, 257, 66 L. Ed. 217, 220, 221.	3
Crancer vs. Lowden, 315 U. S., 631, 635-636, 86 L. Ed., 1077, 1080-1081	4
Henwood vs. McCallum & Robinson:	
167 S. W. (2d), 981	6-7
208 S. W. (2d) 546	7
Vol. 92, L. Ed. Advance Opinions No. 1, 1947 Term, October 13, 1947, 16-17	7
Louisiana & Arkansas Railway Co. vs. Arkansas Oak Flooring Co., et al., 69 Fed. Supp., 372	1
Midstate Horticultural Co. vs. Pennsylvania R. Co., 320 U. S., 356, 64 Sup. Court, 128, 88 L. Ed., 96	8
Pennsylvania R. Co. vs. Carolina Portland Cement Co., 16 Fed. (2d) 760	5
United States vs. Wurts, 303 U. S., 414, 417-418, 82 L. Ed., 932, 935	4
Wisconsin Bridge & Iron Co. vs. Illinois Terminal Co., 88 Fed. (2d) 459	5, 7

STATUTES.

Interstate Commerce Act:	
49 U. S. C. A. Sec. 16 (3) (a)	2
49 U. S. C. A. Sec. 16 (3) (e)	2
49 U. S. C. A. Sec. 16 (3) (f)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 738.

ARKANSAS OAK FLOORING COMPANY, ET AL., *Petitioner*,

v.

LOUISIANA & ARKANSAS RAILWAY COMPANY, *Respondent*.

RESPONDENT'S BRIEF OPPOSING THE GRANTING OF A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

I.

The Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals is reported at *166 Fed. (2d), 98*, and that of the District Court in *69 Fed. Supp., 372*.

II.

Statement of the Case.

The statement of petitioner requires both clarification and amplification.

The case involves the application and construction of *Section 16 (3) (a) and Section 16 (3) (e), Interstate Commerce Act*, in a suit by the carrier for the local rate of 20¢ under a tariff fixing a net transit rate of 12¢ upon delivery

of the rough material and providing that a certain percentage of manufactured product be shipped out within a year after delivery of the rough lumber, and, upon failure, that the full local rate be paid by the shipper.

49 U. S. C. A., Section 16 (3) (a) provides:

> "All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues and not after."

49 U. S. C. A., Section 16 (3) (e) provides:

> "The cause of action in respect of a shipment of property shall, for the purposes of this section be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after."

Under the terms of the tariff, the 20¢ rate only became applicable when a year from delivery had elapsed without reshipment according to its terms. Had there been reshipment, such rate never would have been applicable. No obligation, no "cause of action", no enforceable right for the 8¢ now sued for existed until the reshipment period of one year expired. Suit was brought within two years from that time.

Respondent, in connection with the Y. & M. V. (Illinois Central), published its joint freight tariff No. 140, I. C. C. 1540, known as its Rough Material Tariff, applying to carload shipments of rough hardwood lumber from Woodville, Mississippi, to Alexandria, Louisiana, for manufacture and reshipment. Petitioner, manufacturer, made itself a party thereto by entering into the contract and bond provided for therein. It bound itself to fulfill all the requirements of the tariff and became entitled to receive rough hardwood lumber at the transit station, its switching yards at Alexandria, upon payment of the net transit rate of 12¢ per 100 lbs. This rate was paid. The period for reshipment of the manufactured product was within twelve months from

the date of paid freight bills covering the inbound shipments. The required gateways for reshipment were specified in the tariff. (R. 5-7.) The facts admitted show that reshipments were not so made within twelve months to cover the tonnage involved here. Upon such failure and not until then the tariff required petitioner to pay the applicable rate for local consumption at the manufacturing or transit point, which was 20¢ per 100 lbs. The difference is now sued for.

III.

Argument.

There is involved here a tariff with two contemplated destinations, one the manufacturing point where the rough lumber was delivered, and the other the point or points where the manufactured product, flooring, would be ultimately delivered. It is of the type usually called a milling-in-transit tariff which is and has been widely used by carriers and shippers.

> *Central Railroad Co. of New Jersey* v. *United States*, 257 U. S. 247, 254-255, 257, 66 L. Ed., 217, 220, 221.

When petitioner made itself a party to this tariff it bound itself to reship. The evident purpose of the tariff was this obligation to reship via respondent's line. The rate then fixed to the shipping point was 12¢, the transit rate. This was paid. There was no credit extended as to this rate. Had reshipment been made within the year nothing further would have been due on the rough lumber shipment. When the object of the tariff had been defeated, the obligation to pay the full local rate came into existence.

It is not the case of a shipment to a single destination. Then, of course, (3) (e) fixes the two years of (3) (a) as date of delivery. The freight charge is then due.

It seems to us that the failure to observe these distinctions is the weakness of petitioner's application.

This Court has held that a tariff binds both carrier and shipper with the force of law.

> *Crancer* v. *Lowden*, 315 U. S., 631, 635-636, 86 L. Ed. 1077, 1080-1081.

It cannot be denied that there was no cause of action until the shipping year elapsed. Neither (3) (a) nor (3) (e) relates to a non-existent right or cause. The decision of the Circuit Court of Appeals (as well as of the Supreme Court of Tennessee to which reference will be made) in declaring that the statutory period did not begin to run until there was an assertable cause of action, is in agreement on principle with this Court.

A section of the Revenue Act was involved in a recent case. The Court said:

> "Section 610 is clear when its words are given their commonly accepted import. * * *
>
> * * * * * * * * *
>
> "It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued. Obviously, the Government had no right to sue this taxpayer to recover money before money had been paid to him. The construction urged by respondent would allow the statute of limitations to begin to run against recovery on an erroneous payment before any such payment is made. As said by a House Committee in reporting on a statute of limitations contained in a revenue act, 'Logically the period of limitation should run from the date of payment, since it is at that time that the right accrues.'
>
> "We are of opinion that Congress did not intend the limitations of § 610 to run against the Government until the Government's right 'has accrued in a shape to be effectually enforced.' "

> *United States* v. *Wurts*, 303 U. S., 414, 417-418, 82 L. Ed., 932, 935.

The decisions below (as well as that of Tennessee where this Court refused a writ of certiorari) give effect to the uniformity of the statutory scheme of Section 16.

Petitioner's view would reduce the two years the statute gives in all cases to one year and would be a rebate to petitioner. At page 12 of its petition and brief, it is admitted that its position allows only one year to sue.

It must be borne in mind that this is not a case where the Interstate Commerce Commission or the parties are attempting to extend a period to sue for a charge or trying to extend it by subsequent agreement or action. The tariff and the contract under it to reship, etc., do not affect the two years in which to sue. It is a matter of the two years beginning when, in the language of the *Wurts* case, *supra*, the charge now sued for could be "effectually enforced". The following paragraph from the decision of the Circuit Court of Appeals is pertinent:

> "As pointed out in the Midstate case, the prime purpose of the statute, in fixing the same period after their accrual for suing on all actions, was to secure uniformity and to (fol. 78) prevent discrimination. Full effect can be given this purpose if it is held that delivery to the carrier accrues the cause of action on all shipments under a tariff where the rate is then unalterably fixed, but that where, as here, the transit rate, though the only collectible rate at the time of delivery was, under the tariff subject to change within the year, the cause of action for the local rate cannot be said to have accrued at the time of the delivery but one year thereafter." (R. 75)

There is no validity in the first assigned reason for a writ that the decision is contrary to two other Circuit Court of Appeals decisions. The *Carolina Portland* case, 16 Fed. (2d), 760, related to an ordinary shipment to a single point and the statute was not tolled by storage and demurrage charges which are a part of the transportation charge.

The *Wisconsin Bridge* case, 88 Fed. (2d), 459, is not contra. Indeed, if applicable, it supports the holding here.

It was relied on in the Tennessee case to reach the same holding but by a different route. It did not construe what is delivery under a tariff precisely like we have here but it involved shipments with a transit break, and used the date of ultimate delivery as the date on which the cause of action accrued. Unfinished steel was shipped from Pittsburgh to North Milwaukee and the rate paid. After fabrication it was shipped to Alton, Illinois. Appellant computed a rate from Pittsburgh to Alton and paid it, less the credit. Appellee computed a different combination rate. Delivery was made at Alton on payment of appellant's rate. The last such delivery was on March 13, 1928. Appellee then presented a bill for the balance it claimed. Appellant filed a complaint with the Commission. After its decisions, appellee sued on November 2, 1931. It was held that the proceeding by the shipper did not toll the statute and that Section 16 (3) (f) is only for the benefit of the shipper. Also after the ultimate delivery and after the first decision of the Commission, the concern doing the work, with appellee's consent, released to appellant most of the fund it was holding. Such subsequent event was held to have no bearing on the statute. The point of delivery used in this case was the ultimate destination and all events occurred thereafter.

We do not think there is any force in the second and third assigned reasons either.

The only case in point that has been found or cited by either side here is *Henwood* v. *McCallum & Robinson*, Supreme Court of Tennessee, 167 S. W. (2d), 981. There cotton was shipped to Memphis on a "floating-in" rate of 42¢ per 100 lbs. If reshipped in two years the balance of the through rate would have been paid but that is not involved. What happened was that it was not reshipped in the two years allowed. Thereupon the carrier sued, as here, for the balance of the local rate to Memphis.

The Court pointed out that to take what is the position of petitioner here would cause a rebate. The Court continued:

"* * * Now the object sought to be accomplished in the instant case was to enable the defendant, and other cotton brokers in Memphis, to have the advantage of a low rate, provided the cotton was not held longer than two years. We can hardly escape the conclusion that, under this reduced rate, the railroad could not bring suit within two years after the arrival of a shipment of cotton at Memphis. Had it instituted such an action, it would have been immediately faced with a valid plea of prematurity of suit. We think it naturally and necessarily follows that 49 U. S. C. A. § 16 (3) (e) means that 'the cause of action' shall be deemed to accrue 'upon delivery or tender of delivery thereof' of cotton at a point to which it was reshipped from Memphis. Otherwise the 42¢ rate, or through rate, would not and could not apply. Moreover, the rate itself clearly contemplates a reshipment, and the right to sue for the higher rate would not accrue until the right to reship under the tariff schedule had expired."

Henwood v. *McCallum & Robinson,* 167 S. W. (2d), 981, 982, 983.

The Court then pointed out that the *Wisconsin Bridge* case was not contra and relied on the principle set forth by this Court in the *Wurts* case, *supra,* and concluded:

"* * * Moreover, it would be departing into the realm of speculation for us to conclude that the Congress intended to fix a limitation upon a right of action that could be changed, or altered in any way, by a tariff agreement between carriers and shippers, as contended for in the instant case."

Ibid, 167 S. W. (2d) 984-985.

After the case had gone back and up through the Court of Appeals of Tennessee, the State Supreme Court refused a writ. 208 S. W. (2d), 546. Defendant then applied here for a writ which was refused. Pages 16-17, Advance Opinions, Volume 92, Law Edition, No. 1, 1947 Term, October 13, 1947.

We are aware that the refusal of a writ is not a passing on the merits. However, we ask to be permitted to point out and to have it verified that the application there and the brief were based point-blank on the charge that the State Court decision nullified this Court's construction of Section 16 and was directly contrary to *Midstate Horticultural Company* v. *Pennsylvania R. Co.*, 320 U. S., 356, 64 Sup. Court, 128. We think it passing strange that the writ would have been refused if the remotest chance existed that the grounds were well founded.

The Tennessee Court held that Section 16 (3) (e) related under such a tariff as here to delivery at ultimate destination. A suit in two years from the expiration of the reshipment period was necessarily in time.

The Circuit Court of Appeals reached the same result here but as follows:

> "* * * We believe that the proper disposition of this case is to hold: that the dominant intent of the statute as a whole is to afford two years for suit after the right of action has accrued; that plaintiff's right to sue on the causes of action asserted here had not in fact accrued on the delivery of the shipment; that Sec. 16 (e) has, therefore, no application to a shipment of this kind; and that the case must be decided by determining, under Subd. (a), whether the suit was in fact brought within two years after the cause of action, that is the right to sue, had in fact and in law accrued. We think it was so brought and that the judgment must be affirmed." (R. 77)

If either Court had decided otherwise, it would probably have been the first decision that a statute of limitations ran against a cause of action before there was any cause of action.

Our entire argument answers the fourth and fifth reasons assigned by petitioner. The decisions below are correct.

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

T. W. Holloman,
White, Holloman & White,
Alexandria, Louisiana.

A. L. Burford,
Texarkana, Ark.-Tex.
Attorneys for Respondent.

Joseph R. Brown,
William E. Davis,
Kansas City, Missouri,
Of Counsel.

May 7, 1948.